No. 06-____

IN THE
Supreme Court of the United States

Bounpone B. Sasouvong,
Petitioner,

v.

Washington,
Respondent.

On Petition for Writ of Certiorari
to the Washington Court of Appeals, Division I

PETITION FOR A WRIT OF CERTIORARI

Elaine L. Winters
WASHINGTON APPELLATE PROJECT
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101

Thomas C. Goldstein
AKIN, GUMP, STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036

Jeffrey L. Fisher
Counsel of Record
Pamela S. Karlan
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

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QUESTION PRESENTED

Whether a criminal defendant's right to a jury trial under the Sixth and Fourteenth Amendments is violated when a prior juvenile adjudication – not itself decided by a jury – is used by a judge to impose a longer sentence than otherwise would be permissible.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bounpone Sasouvong respectfully petitions for a writ of certiorari to the Washington Court of Appeals, Division I, in *State v. Sasouvong*, No. 779261.

OPINION BELOW

The relevant trial proceedings and sentencing (App. 4a) are unpublished. The opinion of the Washington Court of Appeals (App. 1a) is unpublished. The Supreme Court of Washington's order denying review (App. 3a) is unpublished.

JURISDICTION

The Washington Supreme Court denied review of this case on April 5, 2007. App. 3a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . ."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property without due process of law . . . ."

Wash Rev. Code § 13.04.011(1) provides: "'Adjudication' has the same meaning as 'conviction' in [Wash. Rev. Code] 9.94A.030, and the terms must be construed identically and used interchangeably."

Wash. Rev. Code § 9.94A.525(2) provides: "Class A and sex prior felony convictions shall always be included in the offender score. Class B prior felony convictions other than sex offenses shall not be included in the offender score, if . . . the offender had spent ten consecutive years in the community without committing any crime . . . . Class C prior felony convictions other than sex offenses shall not be included in the offender score if . . . the offender had spent five consecutive years in the community without committing any crime . . . . This subsection applies to both adult and juvenile prior convictions."

STATEMENT

This case presents a pressing issue concerning the administration of criminal justice, over which the federal and state courts across the country are openly and deeply split. The question is whether a court may use a prior nonjury juvenile adjudication to impose a longer sentence than otherwise would be permissible. Acknowledging the deep divergence of authority on the issue, a divided Washington Supreme Court has held that a court may do so.

1. The State of Washington uses a determinate guidelines system for sentencing felony offenders. *See Blakely v. Washington*, 542 U.S. 296 (2004). Under this system, a defendant's presumptive sentencing range – that is, the range he may receive absent additional factual circumstances – is a function of his "offense level" and his "offender score." Wash. Rev. Code §§ 9.94A.530(1), 510. The higher these factors are, the more severe the presumptive sentence the defendant may receive.

Washington originally allowed judges to find certain facts that subjected defendants to more severe sentences under the State's sentencing grid than otherwise were allowed by guilty verdicts alone. This Court held in *Blakely*,

however, that this method of factfinding in this context implicated the "*Apprendi* rule" – that is, the Sixth Amendment's requirement that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). In response to *Blakely*, Washington now requires all *offense*-related factors that affect defendants' upward exposure to be proved to a jury beyond a reasonable doubt. Wash. Rev. Code §§ 9.94A.530(3), 537(2); *see also id.* §§ 9.94A.125, 310(4)-(7).

These new statutory procedures, however, do not apply to facts that raise defendants' *offender* scores. Thus, Washington trial courts may find by a preponderance of the evidence facts concerning defendant's criminal history and may use those facts to impose longer sentences than otherwise would be permissible. Most importantly for this case, these procedures apply not only to adult convictions but also to adjudications reflecting prior "juvenile criminal behavior." App. 18a. For the purpose of calculating a defendant's offender score, state law provides that even though juvenile adjudications in Washington are not themselves subject to jury trials, *see* Wash. Rev. Code § 13.04.021(2), "adjudication" has "the same meaning as 'conviction,'" *id.* § 13.04.011(1), and thus that – absent narrow exceptions not applicable here – prior juvenile adjudications "shall always be included in the offender score," *id.* § 9.94A.525(2).

2. In 2004, the State convicted Petitioner Bounpone Sasouvong of one count of residential burglary. At sentencing, the State alleged that petitioner had prior adult felony convictions that would have dictated an offender score of seven. Under the Washington sentencing guidelines, an offender score of seven would have permitted a maximum presumptive sentence of fifty-seven months. *See* Wash. Rev.

Code § 9.94A.510. But the State also alleged that petitioner had five prior juvenile adjudications. Counting petitioner's prior juvenile adjudications as convictions – as Washington law requires – raised petitioner's offender score to ten and subjected him to a much higher presumptive range: sixty-three to eighty-four months of confinement. *Id.*

The sentencing court found the State's allegations respecting all of petitioner's criminal and adjudicative history to be true, App. 5a, and imposed a standard range sentence of seventy-five months. App. 7a. The trial court's findings respecting petitioner's alleged juvenile criminal behavior thus resulted in his sentence being increased by one and one-half years based on allegations that he has never had the chance to dispute before a jury.

3. Petitioner appealed his sentence to the Washington Court of Appeals. He argued that the lack of a jury-trial right and the rehabilitative goals of the juvenile justice system render juvenile adjudications sufficiently different from adult criminal convictions that they cannot be exempted from the *Apprendi* rule as "prior convictions." The court of appeals affirmed petitioner's sentence on the basis of *State v. Weber*, 112 P.3d 1287 (2005). App. 1a-2a. In *Weber*, the court of appeals had noted the conflicting authority regarding the constitutionality of treating nonjury prior juvenile adjudications as prior convictions but sided with those courts holding that those "juvenile adjudications that meet constitutionally-required safeguards fall within the prior conviction exception set out in *Almendarez-Torres*[, 523 U.S. 224 (1998),] and upheld in *Apprendi* and *Blakely*." *Weber*, 112 P.3d at 1294.

4. Petitioner then sought review in the Washington Supreme Court, which held the case while it conducted plenary review of the court of appeals' decision in *Weber*. On December 28, 2006, the Washington Supreme Court issued a five-to-four decision affirming the *Weber* decision. *State v. Weber*, 149 P.3d 646 (2006) (reprinted in Appendix at 8a-47a). The majority recognized that including Weber's

prior juvenile adjudications in his offender score "would undeniably increase his maximum sentence above the sentence supported by the jury's verdict" and therefore place the sentence squarely under *Apprendi*'s proscription if the exemption did not apply. App. 12a. Nonetheless, the majority held that "[i]n the absence of authoritative instruction from the United States Supreme Court that juvenile adjudications are not prior convictions," it would not apply the *Apprendi* rule to such adjudications. App. 18a. The majority defended this decision by reasoning that a jury trial underlying a prior conviction is only "one possible" justification for exempting the facts of such convictions from generally applicable Sixth Amendment requirements, not the "exclusive" one. App. 14a. All that is necessary, the majority concluded, is that "sufficient procedural safeguards" have existed in prior proceedings, and juvenile proceedings are sufficiently reliable to render juvenile adjudications exempt from the Sixth Amendment as a means of increasing a defendant's punishment. *Id.*

Justice Madsen authored the dissent. She argued that "[c]ases settling for a 'reliability' standard for juvenile adjudications disregard the role that the jury plays in assuring a fair decision." App. 40a. Because the "right to a jury trial is granted to criminal defendants in order to prevent oppression by the government," *id.*, there is "no substitute" for this right, App. 44a. Accordingly, Justice Madsen concluded that "in order to fall within the prior conviction exception to the rule in *Apprendi*," a juvenile adjudication must have afforded the defendant "the right to trial by jury." App. 37a.

Following its decision in *Weber*, the Washington Supreme Court denied review of *Sasouvong*'s case. App. 3a.

5. This petition followed. (A petition for certiorari has just been filed in the *Weber* case as well. *See Weber v. Washington*, No. 06-11257.)

REASONS FOR GRANTING THE WRIT

The federal courts of appeals and state supreme courts are deeply and intractably splintered over whether *Apprendi*'s exception for prior convictions extends to juvenile adjudications that were not subject to jury trials. In recent years a state government, the federal government, and individual defendants have all told this Court that this issue needs to be resolved.

This Court should do so now. The question whether juvenile adjudications may serve as a basis for increasing a defendant's sentence without the defendant ever having had the right to have a jury find that his alleged juvenile conduct warrants punishment or even actually occurred arises with great frequency. It also is outcome determinative far more often than constitutional disputes respecting prior adult criminal convictions. Finally, the Washington Supreme Court's holding that courts may unilaterally rely on such adjudications to increase defendants' sentences stretches the prior conviction exception beyond its breaking point.

A. Federal and State Courts Are Intractably Divided Over Whether Prior Nonjury Juvenile Adjudications Constitute "Prior Convictions" for Purposes of the Apprendi Rule.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," *id.* at 490. The *Apprendi* Court carved out the "narrow exception," *id.*, concerning prior convictions because it had decided in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), that courts do not violate the Sixth Amendment by increasing defendants' sentences based on their having prior convictions. Even though the *Apprendi* Court found it "arguable that *Almendarez-Torres* was incorrectly decided," it declined to consider overruling it because "Apprendi [did]

not contest the decision's validity." *Apprendi*, 530 U.S. at 489-90. In any event, the Court found that *Almendarez-Torres* was "at best an exceptional departure from the historic practice" of presenting sentence-enhancing facts to juries and was rooted in the "unique" status of prior convictions. *Apprendi*, 530 U.S. at 487, 490. "[U]nlike virtually any other consideration used to enlarge the possible penalty for an offense . . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Jones v. United States*, 526 U.S. 227, 249 (1999).

Following the *Apprendi* decision, courts have reached conflicting decisions respecting whether prior juvenile adjudications in states that do not – as most do not – afford the right to a jury trial constitute "prior convictions" for purposes of *Apprendi*'s prior conviction exception. The Supreme Court of Washington denied review in petitioner's case pursuant to its holding in *State v. Weber*, 149 P.3d 646 (2006), that "juvenile adjudications are convictions for the purposes of *Apprendi*'s prior conviction exception." App. 19a. This holding deepened the three-way conflict over this issue among the state supreme courts and the federal courts of appeals to seven to one to two.

1. The Washington Supreme Court decision that controls this case is one of seven from state courts of last resort and federal appellate courts that have held that courts may increase defendants' sentences based on juvenile adjudications even when those adjudications were not subject to the jury trial right. In reaching this result, which the Washington Supreme Court acknowledged conflicts with decisions from other jurisdictions, the court reasoned that nonjury juvenile adjudications fall under *Apprendi*'s prior conviction exception because an underlying jury trial is only "one possible" justification for exempting factual allegations from generally applicable Sixth Amendment requirements, not the "exclusive" one. App. 14a. The court asserted that

"*Apprendi* recognized that prior convictions are excluded from the general rule because of the certainty that procedural safeguards afford them." App. 17a (quotation omitted). Because the court found the relevant juvenile proceedings "so reliable that due process of law is not offended," *id.* (quotation omitted), it found that defendants' "due process and jury trial rights are not violated" by using prior adjudications to enhance criminal sentences above the level authorized by the jury verdict, App. 19a.

The Washington Supreme Court's holding is consistent with the law of the Third, Eighth, and Eleventh Circuits, as well as the Kansas, Indiana, and Minnesota Supreme Courts. These courts similarly hold that the lack of a jury trial in juvenile proceedings does not prevent courts from increasing adult defendants' sentences based on the conduct alleged in those prior proceedings, and they focus their reasoning on the same reliability inquiry that motivated the Washington Supreme Court. *See United States v. Smalley*, 294 F.3d 1030, 1032-33 (8th Cir. 2002) ("[T]he question of whether juvenile adjudications should be exempt from *Apprendi*'s general rule should . . . [turn] on an examination of whether juvenile adjudications, like adult convictions, are so reliable that due process of law is not offended by such an exemption."), *cert. denied*, 537 U.S. 1114 (2003); *United States v. Jones*, 332 F.3d 688, 696 (3d Cir. 2003) ("[W]e find nothing in *Apprendi* or *Jones* . . . that requires us to hold that prior nonjury juvenile adjudications that afforded all required due process safeguards cannot be used to enhance a sentence . . . ."), *cert. denied*, 540 U.S. 1150 (2004); *United States v. Burge*, 407 F.3d 1183, 1190 (11th Cir. 2005) ("Juvenile adjudications . . . provide more than sufficient safeguards to ensure the reliability that *Apprendi* requires . . . ."), *cert. denied*, 126 S. Ct. 551 (2005); *State v. Hitt*, 42 P.3d 732, 740 (Kan. 2002) ("The *Apprendi* Court spoke in general terms of the procedural safeguards attached to prior conviction. It did not specify *all* procedural safeguards nor did it require

certain *crucial* procedural safeguards."), *cert. denied*, 537 U.S. 1104 (2003); *Ryle v. State*, 842 N.E.2d 320, 323 (Ind. 2005) ("The main concern [in the *Apprendi* exception] was whether the prior conviction's procedural safeguards ensured a reliable result, not that there had to be a right to a jury trial."), *cert. denied* 127 S. Ct. 90 (2006); *State v. McFee*, 721 N.W.2d 607, 615 (Minn. 2006) ("Absent clear direction from the United States Supreme Court, we will not upset our precedent upholding the use of juvenile criminal behavior in sentencing . . . .").

2. The Louisiana Supreme Court has reached the opposite conclusion, reasoning that the right to trial by jury does not turn on reliability and that a criminal defendant must have at least one opportunity to challenge allegations before a jury before those allegations may serve as a basis for criminal punishment. *State v. Brown*, 879 So.2d 1276 (La. 2004), *cert. denied*, 543 U.S. 1177 (2004). Consequently, a court may not increase a defendant's sentence above an otherwise binding threshold based on allegations of juvenile criminal behavior that the defendant did not have the ability to challenge before a jury.

The *Brown* court emphasized that "the history of juvenile courts illustrates why juvenile courts have fewer [procedural] safeguards." *Id.* at 1285. "Under the guise of *parens patriae*, juvenile courts emphasized treatment, supervision, and control rather than punishment, and exercised broad discretion to intervene in the lives of young offenders." *Id.* at 1286. Because of these distinctions between juvenile and criminal contexts, which still exist today, the court found that "there is a difference between a 'prior conviction' and a prior juvenile adjudication." *Id.* at 1289. "If a juvenile adjudication, with its lack of a right to a jury trial which is afforded to adult criminals, can then be counted as a predicate offense the same as a felony conviction . . . then the entire claim of *parens patriae* becomes a hypocritical mockery." *Id.* Because a juvenile adjudication is not "afforded *all* the

guarantees afforded adult criminals under the constitution," and "is not a conviction of any crime," *id.* at 1289, the court held that it "cannot be excepted from *Apprendi*'s general rule," *id.* at 1290.

3. The Oregon Supreme Court and Ninth Circuit have adopted something of a middle ground. In *State v. Harris*, 118 P.3d 236 (Or. 2005), the Oregon Supreme Court – like the Louisiana Supreme Court – recognized that under this Court's jurisprudence, "the jury's importance in establishing the general validity of convictions under the Sixth Amendment is founded upon more than the relatively narrow function of the jury as a reliable factfinder," *id.* at 243. "From the framers' perspective, the jury was also meant to serve as the people's check on judicial power at the trial court level." *Id.* Thus the Oregon court specifically rejected the position first adopted by the Eighth Circuit, recognizing that this Court "has made clear that reliability is not the *sine qua non* of the Sixth Amendment; that constitutional provision also serves to divide authority between judge and jury." *Id.* at 245. It accordingly held that the "Sixth Amendment requires that when . . . an adjudication is offered as an enhancement factor to increase a criminal sentence, its existence must either be proved to a trier of fact or be admitted by a defendant." *Id.* at 246.

At the same time, the Oregon Supreme Court declined to hold – as Louisiana Supreme Court did – that when a state conducts juvenile adjudications without juries, such adjudications "cannot be used to enhance adult criminal sentences unless, and until, the facts giving rise to those adjudications are presented to a jury and relitigated." *Id.* at 243. The Oregon enhancement law at issue in *Harris* did not require the state to prove to the sentencing court that the defendant actually committed the conduct alleged in a prior juvenile adjudication; it required the state to prove only the "existence" of the prior juvenile adjudication – that is, only the fact that the adjudication was indeed part of the

defendant's record. *Id.* And, according to the Oregon Supreme Court, "it is of no moment – at least for Sixth Amendment purposes – if the legislature chooses to designate, *inter alia*, a prior nonjury juvenile adjudication as an element that increases the seriousness of a crime or lengthens a criminal sentence, so long as the *existence* of that prior adjudication is proved to a jury, or such a requirement is knowingly waived." *Id.* (footnotes omitted).

In *United States v. Tighe*, 266 F.3d 1187 (9th Cir. 2001), the Ninth Circuit likewise concluded that automatically treating juvenile adjudications as "prior convictions" under *Apprendi* "ignores the significant constitutional differences between adult convictions and juvenile adjudications," *id.* at 1192-93. The court noted that *Apprendi*'s tolerance for *Almendarez-Torres* was "premised on sentence-enhancing prior convictions being the product of proceedings that afford crucial procedural protections – particularly the right to a jury trial and proof beyond a reasonable doubt." *Tighe*, 266 F.3d at 1194. The Ninth Circuit accordingly held that "the 'prior conviction' exception to *Apprendi*'s general rule must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial." *Id.*

Because the juvenile adjudication used in that *Tighe* to increase the defendant's sentence beyond the otherwise-applicable maximum was not subject to jury trial, the Ninth Circuit reversed the defendant's sentence and held the enhancement statute at issue (the Armed Career Criminal Act, or ACCA) unconstitutional as applied to nonjury juvenile adjudications. *Id.* Although the Ninth Circuit did not explicitly state the reach of its Sixth Amendment ruling, it suggested that if Congress amended the ACCA to allow the government to prove the existence of prior nonjuvenile adjudications to juries, then ACCA enhancements on that basis would be constitutional. *Id.* at 1195 n.5.

4. Nothing could be gained from further percolation. This conflict over the use of nonjury juvenile adjudications to enhance criminal sentences above the otherwise-authorized levels is now deeply entrenched. The Washington Supreme Court and several other courts have acknowledged the diverging lines of authority, and courts now are simply choosing sides. *See, e.g.*, App. 15a-16a, *McFee*, 721 N.W.2d at 616 n.13; *Brown*, 879 So.2d at 1283-85 (describing the early development of the split). The Ninth Circuit also repeatedly has reiterated its position, suggesting it will not reconsider it. *See United States v. Blanton*, 476 F.3d 767 (9th Cir. 2007) (applying *Tighe* without questioning its soundness); *Boyd v. Newland*, 467 F.3d 1139 (9th Cir. 2006) (reaffirming that "we do not recognize nonjury juvenile adjudications as 'convictions' falling within the *Apprendi* exception"), *cert. denied*, 127 S. Ct. ___ (May 14, 2007); *United States v. Washington*, 462 F.3d 1124, 1141-42 (9th Cir. 2006) (same). Courts' disparate treatment of defendants – sometimes within the same jurisdiction depending only on whether a case is proceeding in state or federal court – will persist (and likely worsen) until this Court steps in.

B. The Constitutional Question Presented Is Extremely Important to the Sound Administration of Criminal Justice.

Parties on every side of this issue have urged this Court to resolve the ever-deepening conflict among the federal circuits and state supreme courts over whether nonjury juvenile adjudications constitute "prior convictions" for purposes of the *Apprendi* doctrine. A state government, *see* Petition for Writ of Certiorari, *Louisiana v. Brown* (No. 04-770), and the federal government, *see* Brief for the United States, *Smalley v. United States* (No. 02-6693), have recognized the "circuit conflict on that issue" and agree that "this Court's review is warranted," *id.* at 8. Petitioner too urges this Court to take review in order to delineate the scope of criminal defendants' jury trial rights relating to sentencing

based upon prior juvenile adjudications. The issue is one that continually recurs and that generates large differences in the duration and severity of sentences for criminal defendants. It also is one that implicates constitutional protections of "surpassing importance." *Apprendi*, 530 U.S. at 476.

1. Thirty-seven states, including Washington, do not allow juveniles accused of criminal behavior to challenge those accusations before juries.[1] While it is difficult to estimate how many adult defendants' sentences in these states are increased above otherwise binding thresholds because courts find that they committed prior criminal offenses as juveniles in one of these states, the number is undeniably extremely large. For starters, it seems clear that a significant proportion of adult convicted defendants have prior records of juvenile adjudications. At the time of a 1996 survey, five states maintained databases that permitted an analysis of juvenile adjudications among convicted adult defendants. The survey found that the proportion of convicted defendants reported to have juvenile adjudication records was 8% in Washington state, 11.2% in Michigan, 6% in Pennsylvania, 9% in Minnesota, and 5.4% in Oregon. Institute for Law and Justice, *Prosecutor and Criminal Court Use of Juvenile Court Records: A National Study* 5 (Aug. 1996), *available at* http://www.ilj.org/publications/juvenile_records.pdf.

For such defendants, a finding that they engaged in criminal behavior as juveniles can make an enormous difference in the length of the sentence that courts may impose. Having a record of prior juvenile adjudications

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[1] Stephen F. Donahoe, *The Problem with Forgiving (but Not Entirely Forgetting) the Crimes of Our Nation's Youth: Exploring the Third Circuit's Unconstitutional Use of Nonjury Juvenile Adjudications in Armed Career Criminal Sentencing*, 66 U. PITT. L. REV. 887, 904 n.109 (2005). In states that grant juveniles the right to trial by jury, the question presented does not arise because the prior adjudication itself was established subject to the jury trial guarantee. *See, e.g., State v. Greist*, 121 P.3d 811, 813-15 (Alaska App. 2005).

allows a court to increase an adult defendant's sentence by over forty years in eleven states, by twenty to forty years in six states, and by one to twenty years in seven states. Joseph B. Sanborn, Jr., *Striking Out on the First Pitch in Criminal Court*, 1 BARRY L. REV. 7, 21 (2000).

The impact of a judicial finding that a defendant has a record of juvenile adjudications can be particularly serious in states with three-strikes laws or similar offender-points-based enhancements. California, Louisiana, and Texas each have three-strikes laws under which juvenile adjudications may count for all but the final strike. Under these laws, a judicial finding respecting a defendant's juvenile adjudication can spell the difference between a term of a few years and a life sentence for his first adult conviction. *See, e.g.*, *People v. Lee*, 111 Cal. App. 4th 1310 (Cal. Ct. App. 2003) (upholding the use of a prior juvenile adjudication as one strike under the California three-strikes law); Sanborn, *supra*, at 24. Florida uses a points-based approach that is essentially a more nuanced version of California's three-strikes law; again, juvenile adjudications can serve as all but the final strike. *See, e.g.*, *McCullough v. Singletary*, 967 F.2d 530 (11th Cir. 1992) (upholding the use of defendant's juvenile adjudication record to enhance a burglary and sexual assault conviction into a life sentence). In numerous other states, such as Washington, courts' findings that adult defendants committed criminal conduct as juveniles routinely expose defendants to several months or years of extra prison time.

2. The question whether juvenile criminal conduct must be proved to a jury beyond a reasonable doubt before it may be used to enhance a defendant's sentence is often outcome determinative. In *Rangel-Reyes v. United States*, 126 S. Ct. 2873 (2006), Justice Stevens noted that there was no pressing need for this Court to reconsider the adult prior conviction exception of *Almendarez-Torres* itself because "[t]he denial of a jury trial on the narrow issues of fact concerning a defendant's prior conviction history . . . will seldom create

any significant risk of prejudice to the accused." *Id.* at 2873 (Stevens, J., respecting the denial of certiorari). That is, because the accused facing heightened punishment based on prior convictions already had the opportunity to challenge the factual allegations underlying the convictions before a jury, the defendant would be able in the current trial to challenge only whether the prior conviction that the prosecution alleges actually exists and whether he was actually the person convicted.

But that is manifestly *not* the case with respect to juvenile adjudications. As the Louisiana Supreme Court has recognized, the Sixth Amendment requires that a defendant have at least one opportunity to dispute before a jury a state's allegations that subject him to heightened punishment. Accordingly, a court may not increase an adult defendant's sentence beyond an otherwise binding threshold based on prior juvenile conduct that was not subject to a jury trial unless the defendant has the right to put the state to its proof regarding the underlying conduct before a jury in the current proceeding. That prosecutorial burden is qualitatively different – both more comprehensive and more onerous – than simply proving the mere existence of the prior adjudication. And if the enhancement law at issue does not provide a procedural mechanism for relitigating those underlying accusations before a jury, it is unconstitutional. *Brown*, 879 So.2d at 1290.

Even if the Oregon Supreme Court and the Ninth Circuit were correct that the Sixth Amendment entitles a defendant to dispute at least the *existence* of a prior nonjury juvenile adjudication (but not the allegations underlying the adjudication) before the current jury, this rule would still affect far more cases than overruling *Almendarez-Torres* would. The right to a jury trial "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004). This power, as Judge Friendly

explained, gives juries the authority to issue verdicts "in the teeth of both law and facts . . . to prevent punishment from getting too far out of line with the crime." *United States v. Maybury*, 274 F.2d 899, 902 (2d Cir. 1960); *see also Apprendi*, 530 U.S. at 579 n.5 (juries historically have "devised extralegal ways of avoiding . . . the more severe form of the offense alleged, if the punishment associated with the offense seemed to them disproportionate to the seriousness of the conduct"). Therefore, even if sentence-enhancement laws provided a means of proving the existence of nonjury adjudications to juries and juries found record-keeping with respect to juvenile adjudications as reliable as with respect to adult convictions, it seems far more plausible that juries would use their constitutionally mandated mitigating authority to prevent judges from increasing defendants' punishments based on the existence of prior juvenile adjudications than based on prior adult criminal convictions. Adult defendants may have committed the conduct underlying juvenile adjudications long ago and, by definition, the conduct was "'not as morally reprehensible as that of an adult.'" *Roper v. Simmons*, 543 U.S. 551, 570 (2006) (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)). Juvenile defendants may even have declined to challenge contestable accusations because stipulating to the state's charges subjected them to rehabilitative services and not to punishment. Juries may perceive it as unfair to punish defendants for having declined to struggle against the state's attempts to act in their best interests as *parens patrie*.

3. In contrast to the persisting controversy over using prior convictions to increase defendants' sentences, the uncertainty over whether courts may use nonjury juvenile adjudications to increase defendants' sentences is generating disparate treatment that will not cease until this Court acts. Instead of allowing the government to prove the existence of nonjury juvenile adjudications to juries, district courts in the Ninth Circuit are now granting acquittals when the govern-

ment seeks enhancements based on such adjudications, and these acquittals are not subject to appellate review. *See Blanton*, 476 F.3d at 772. Unless and until this Court resolves the question presented, federal defendants in the Ninth Circuit who are prosecuted under the Armed Career Criminal Act will be subject to vastly different punishment than will defendants in other circuits.

C. The Washington Supreme Court's Holding that Nonjury Juvenile Adjudications Constitute "Prior Convictions" for Purposes of the *Apprendi* Rule Is Wrong on the Merits.

This Court's Sixth Amendment jurisprudence dictates that a judge may not constitutionally use prior juvenile adjudications that were not themselves subject to a jury trial to increase a defendant's sentence beyond the level otherwise permitted.

Apprendi's prior-conviction exception derives from this Court's decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), in which this Court held that a court may increase a defendant's sentence beyond an otherwise binding statutory limit based on the fact that the defendant has previously been convicted of a crime, *id.* at 243-44.[2] The following Term, however, this Court made clear that the judicial factfinding that *Almendarez-Torres* allows is a limited exception – and not the rule – concerning the right to trial by jury. "[U]nlike virtually any other consideration used to enlarge the possible penalty for an offense . . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial

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[2] This Court need not reconsider its holding in *Almendarez-Torres* in order to resolve the question at issue here. But to the extent that this Court wishes to use this case as a vehicle for reconsidering *Almendarez-Torres*, the validity of that decision could be considered "fairly encompassed" within the question presented. *See* Supreme Court Rule 21.1(a).

guarantees." *Jones v. United States*, 526 U.S. 227, 249 (1999).

It was against this background that this Court, in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), "confirm[ed] the opinion that [it] expressed in *Jones*. Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," *id.* at 490. Again, this Court emphasized that the prior conviction exception is "narrow" and that "there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial . . . and allowing the judge to find the required fact." *Id.* at 490, 496.

To state what should be obvious, a juvenile adjudication in which the defendant did not have the right to a jury trial is not, in *Apprendi*'s words, "a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial." *Id.* at 496. Nonjury juvenile adjudications thus do not satisfy a prerequisite for the prior conviction exception – namely, that the defendant already have had one opportunity to dispute the state's allegations before a jury.

But even apart from the empty jury box in juvenile proceedings, a juvenile adjudication is not even a "conviction" of any crime. It is a finding of civil delinquency that allows the state to require the juvenile to undergo rehabilitative treatment. Accordingly, this Court has made clear that a court's role in a modern, nonjury juvenile proceeding is "*not* to ascertain whether the child [is] 'guilty' or 'innocent'" but rather to determine whether the child needs the state's "care and solicitude." *In re Gault*, 387 U.S. 1, 15 (1967) (emphasis added); *see also Brown*, 879 So.2d at 1286-89. The *Gault* principle is not only desirable but necessary: If modern juvenile proceedings lost this "intimate, informal protective" focus, their dispensing with juries would be unconstitutional, for they would directly constitute

"criminal proceedings" covered by the Sixth Amendment's Jury Clause. *McKeiver v. Pennsylvania*, 403 U.S. 528, 545-50 (1971).[3]

It is no answer to say that *Apprendi*'s prior conviction exception should nonetheless be extended to include juvenile adjudications because such adjudications "are so reliable that due process of law is not offended." App. 17a (*State v. Weber*, 149 P.3d 646, 652 (Wash. 2006) (quoting *United States v. Smalley*, 294 F.3d 1030, 1032-33 (8th Cir. 2002))). Due process reliability is beside the point. We are concerned here with the procedural right to trial by jury. And "the jury's importance in establishing the general validity of convictions under the Sixth Amendment is founded upon more than the relatively narrow function of the jury as a reliable factfinder. From the framers' perspective, the jury was also meant to serve as the people's check on judicial power at the trial court level." *Harris*, 118 P.3d at 243; *see also Blakely*, 542 U.S. at 306 ("jury trial is meant to ensure [the people's] control in the judiciary"); *Schriro v. Summerlin*, 542 U.S. 348, 355 (2004) (Framers installed jury trial right because of the jury's perceived independence, not any factfinding accuracy). A court may no more "dispens[e] with jury trial because the defendant is obviously guilty," *Crawford v. Washington*, 541 U.S. 36, 62 (2004), than it may

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[3] It is true that recent changes to Washington juvenile law – and to juvenile proceedings throughout the country – have somewhat modified that law's focus and "imposed more traditional criminal punishment following an adjudication of guilt." App. 18a. But juveniles accused of criminal behavior in Washington still have no right to a trial by jury, *see* Wash. Rev. Code § 13.40.140, and the constitutionality of that state of affairs under *McKeiver* depends on the continuing reality of the "unique rehabilitative nature of juvenile proceedings." *State v. Tai N.*, 113 P.3d 19, 22 (Wash. App. 2005) (reaffirming constitutionality of juvenile sentencing system) (internal quotation omitted); *see also* App. 42a (Madsen, J., dissenting) (noting that juvenile proceedings in Washington "are still demonstrably different, with different emphases and different consequences, than those from the criminal context").

dispense with the jury trial right with respect to a sentence enhancement because the state's proffered support for the enhancement is obviously reliable.

To reject this conclusion, one must accept one of two alternatives. The first is that a legislature may choose to label *any* past determination of wrongdoing at all a "conviction" – thereby allowing a judge to enhance a defendant's sentence on the basis of its existence – so long as the past determination is "reliable" for due process purposes. Under this view, states could allow courts unilaterally to enhance sentences based on the results of all sorts of prior proceedings that are not subject to jury trials. States, for example, could allow courts to impose heightened punishment based on prior convictions for crimes that carry a maximum prison term of fewer than six months, even though defendants generally have no constitutional right to jury trials respecting such charges. *See Baldwin v. New York*, 399 U.S. 66, 68-69 (1970); *Blanton v. North Las Vegas*, 489 U.S. 538, 542-43 (1989). States might also allow heightened punishment – again, without any jury involvement whatsoever – based on convictions in foreign countries that do not provide a right to jury trial, *see United States v. Kortgaard*, 425 F.3d 602, 610 (9th Cir. 2006) (confronting such an enhancement but finding it unconstitutional on other grounds), or even based on courts' determinations respecting prior administrative findings of wrongdoing, such as immigration violations, school suspensions, or employment disciplinary measures. *See, e.g., United States v. Covian-Sandoval*, 462 F.3d 1090, 1097-98 (9th Cir. 2006) (applying *Tighe* to preclude judicial sentence-enhancing findings respecting deportation orders), *cert. denied*, 127 S. Ct. 1866 (2007). So permissive a view of *Apprendi*'s prior conviction exception would make a mockery of this Court's insistence in *Jones* that "a prior conviction must itself have been established through procedures satisfying the fair notice,

reasonable doubt, and jury trial guarantees." *Jones v. United States*, 526 U.S. 227, 249 (1999).

The other alternative is that legislatures may label past findings as "convictions" within limits that are crossed when the legislature strays *too far* from what looks like a criminal conviction. Under this view, criminal and quasi-criminal adjudications that lack the jury trial guarantee would qualify as "prior convictions" for Sixth Amendment purposes, but purely civil and administrative proceedings might not. But as this Court held in *Blakely* with respect to a similar "too far" argument:

> Whether the Sixth Amendment incorporates this manipulable standard rather than *Apprendi*'s bright-line rule depends on the plausibility of the claim that the Framers would have left definition of the scope of jury power up to judges' intuitive sense of how far is too far. . . . [T]hat claim [is] not plausible at all, because the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury.

542 U.S. at 308.

The simple rule should be that if a legislature refuses to equip a hearing (be it labeled criminal or adjudicatory) with all of the protections that the Constitution guarantees to criminal defendants, including trial by jury, it cannot later call an adverse outcome a "conviction" for the purpose of the *Apprendi* prior conviction exception. Here, no jury has ever found that the state may punish petitioner for the conduct alleged in his prior juvenile adjudications. Accordingly, the trial court violated the Sixth Amendment by increasing his sentence on that basis.

D. This Case Is an Ideal Vehicle for Resolving the Question Presented.

Three aspects of this case make it a perfect vehicle for resolving whether nonjury prior juvenile adjudications constitute "prior convictions" for purposes of the *Apprendi* rule.

1. Procedurally, this case is on direct review from a final judgment affirming petitioner's conviction and sentence. Petitioner also timely raised the federal constitutional issue presented here, and the Washington Court of Appeals considered the issue entirely on the merits. App. 1a-2a. Consequently, no retroactivity or jurisdictional concerns come into play.

2. The question presented is unquestionably outcome determinative. The highest sentence petitioner could have received based on his crime of conviction and his prior adult convictions was fifty-seven months. *See supra* at 3-4. Yet the trial court imposed a sentence of seventy-five months based on its finding that petitioner had violated criminal statutes as a juvenile. The legitimacy of this one-and one-half year increase in petitioner's sentence thus stands or falls according to whether the Sixth Amendment permitted the trial court to make those findings with respect to petitioner's juvenile behavior.

3. Finally, this case – unlike others that have presented this issue to this Court – arises in the context of an underlying sentencing law that affords this Court the opportunity to choose among the three competing positions that various federal and state courts have adopted with respect to this issue. The Washington Supreme Court stated in *Weber* that "[its] State's system anticipates that individuals who are not rehabilitated and who reoffend as adults may be punished in a manner that considers their preceding juvenile criminal behavior." App. 18a. Thus, to the extent that the Oregon Supreme Court is correct that the Sixth Amendment allows state law to condition an increase sentencing range on the

mere *existence* of a prior juvenile adjudication – regardless of whether the current factfinder actually believes that the defendant actually committed the wrongful behavior underlying the adjudication – Washington law requires the State to establish more than merely "the fact that a juvenile adjudication *occurred*." App. 19a n.5. Washington law, as authoritatively explicated by the Washington Supreme Court, contemplates an increased sentence only if the court finds that the defendant's underlying "behavior" as a juvenile was criminal in nature. App. 18a. Accordingly, this Court clearly could hold – as the defendant in *Weber* urged, *id.*, and as petitioner urges – that the Sixth Amendment under these circumstances requires proof to the current jury that the defendant's alleged juvenile behavior in fact violated the criminal statute at issue. Alternatively, the Court could hold – along the lines of the Oregon Supreme Court – that the Sixth Amendment allows defendants to contest before the current jury at least whether they were involved in the prior juvenile adjudications the State alleges. Either way, this Court would be compelled to conclude that the one and one-half year increase to petitioner's sentence was unconstitutionally imposed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Elaine L. Winters
WASHINGTON APPELLATE PROJECT
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101

Jeffrey L. Fisher
Counsel of Record
Pamela S. Karlan
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081

Thomas C. Goldstein
AKIN, GUMP, STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

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